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In the Supreme Court of the United States

OCTOBER TERM, 1975

PAY MING LEU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner, a medical doctor, was convicted of nineteen counts of attempting to dispense Schedule II and III controlled substances by means of prescriptions issued outside the course of professional practice, in violation of 21 U.S.C. 841(a)(1) and 846. At the same time, he was acquitted of eleven counts of dispensing Schedule II and III controlled substances outside the course of professional practice, contrary to 21 U.S.C. 841(a)(1).[1] Petitioner was sentenced to five con-

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[1]Counts 1 through 11 of the indictment charged petitioner with unlawful dispensing, while counts 12 through 30 charged that on separate occasions he had attempted unlawfully to dispense. The controlled substances involved in the indictment were Ritalin, containing methylphenidate, a Schedule III substance; Seconal, containing secobarbital, a derivative of barbituric acid, a Schedule III substance; Tuinal, containing sodium amobarbital and sodium secobarbital, Schedule III substances; and Desoxyn, containing methamphetamine, a Schedule II substance. While the indictment and the court's instructions erroneously indicated that methylphenidate and barbituric acid were Schedule II rather than Schedule III controlled substances, petitioner has alleged no prejudice from this variance and we can perceive none.

secutive one-year prison terms, to be followed by three years' special parole. The court of appeals affirmed on February 27, 1975 (511 F.2d 1062; Pet. App. 1a-22a) and denied rehearing on March 18, 1975 (Pet. App. 23a). The petition for a writ of certiorari was filed on May 21, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court.

The testimony of three undercover agents of the Drug Enforcement Administration and an agent of the Illinois Legislative Investigating Commission showed that between April and September, 1973, petitioner repeatedly prescribed controlled substances in a manner inconsistent with any legitimate medical purpose.

Agent Bernard Ward testified that on his first visit to petitioner, he asked for $100 worth of Ritalin. Petitioner said that he could only give him a prescription for 90 pills for which Ward paid petitioner $20. Five days later, Agent Ward requested but was refused another prescription for Ritalin because, as petitioner explained, it was "too early." Ward then asked for Seconal and received a prescription for a similar drug, Tuinal, petitioner advising him that he would "have to take whatever is given" (Tr. 17-24). On Ward's fourth visit, petitioner advised him that "prices may go up" in the future (Tr. 28-29). On no occasion did petitioner give Ward a physical examination or take his medical history (Tr. 29).

Agent Kenneth Adams testified that he received a prescription for 90 Ritalin pills after telling petitioner that, contrary to a written notation by petitioner's receptionist, he was not "kicking any habit" but wanted the Ritalin to get high at a party. Adams paid $20 for the prescription (Tr. 52). On his next visit Adams received prescriptions for Ritalin and Seconal (Tr. 56).

Agent Edward Doyle went to petitioner in September, 1973, and told him that since July, when he had last seen petitioner, he had been in Canada selling methylphenidate

(the active ingredient in Ritalin) (Tr. 181). Petitioner wrote Doyle a prescription for Desoxyn in the name of Eddie DeGrazia, Doyle's undercover name. Petitioner explained that he could not simultaneously write a prescription for Ritalin to the same person, so he wrote it in another name which he knew was fictitious (*ibid.*). He described the transaction to Doyle as "cash and carry" and charged him $25 for each prescription.

Petitioner asked Doyle which of the drugs was better. Doyle replied that he did not know since he did not personally use the Ritalin but sold it (Tr. 182). Petitioner then remarked: "Everybody has to make a living" (*ibid.*). In a later conversation about Doyle's trafficking, petitioner cautioned him to be careful of the police (Tr. 196). Petitioner never gave Doyle a physical examination or took his medical history (Tr. 197-198).

Agent Eddie Brown received prescriptions from petitioner at intervals ranging from two days to 2 1/2 months using the names of Eddie Brown, Arnie Wilson, Bonnie Hill, Billy or Lenora Brown, Lenora Wilson and Glenn Gray. On one visit, Agent Brown requested prescriptions for Ritalin and Seconal because he was having a party (Tr. 87). On a later visit, he told petitioner that he was selling the drugs petitioner was prescribing for him (Tr. 117).

Petitioner issued the Ritalin prescriptions to Brown and others on prepared forms requiring only the name and signature of the recipient. Frequently petitioner's security guard would enter the purchaser's name; but when petitioner issued prescriptions in two different names simultaneously, he entered the names himself (Tr. 111, 121).

1. Petitioner contends that as a registered physician he is immune from prosecution under 21 U.S.C. 841(a)(1).[2]

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[2]While petitioner raises this issue somewhat obliquely (see Pet. 3), his argument in behalf of "medical freedom" (Pet. 11) and his reference to *United States* v. *Moore*, 505 F.2d 426 (C.A. D.C.), certiorari granted, 420 U.S. 924 (Pet. 11), suggest a claim that Congress did not intend physicians to be subject to prosecution under Section 841(a)(1).

This issue is presently before this Court in *United States* v. *Moore*, certiorari granted, 420 U.S. 924.[3] Accordingly, we suggest that the Court hold the instant petition pending its decision in *Moore*.[4]

Petitioner's remaining contentions are without merit.

2. Petitioner claims that his convictions for attempting to dispense controlled substances are invalid because the government agents made no effort to fill the prescriptions that were the basis of those convictions. He reasons that, because "dispense" means to "deliver a controlled substance * * * " (21 U.S.C. 802(10)), a prerequisite to his conviction for attempted unlawful dispensing was an attempt by the recipients of the prescriptions to obtain delivery of controlled substances.

However, 21 U.S.C. 802(10) expressly defines "dispense" as "including the prescribing" as well as the sale of controlled substances.[5] Thus, insofar as a physician is concerned, the act of dispensing is complete when he issues a prescription. Accordingly, petitioner could properly

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[3]Petitioner was convicted of violating 21 U.S.C. 846, which provides for punishment of any person "who attempts or conspires to commit any offense defined in this subchapter * * * ." However, because he was charged with attempting to violate 21 U.S.C. 841(a)(1), the necessary predicate for his conviction is that he was not immune from prosecution under Section 841(a)(1)—the issue before the Court in *Moore*.

[4]We are sending a copy of our brief in *Moore* to petitioner's counsel.

[5]21 U.S.C. 802(10) provides:

> The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

have been charged with actual dispensing even though the prescriptions he issued to the agents were not presented for filling.[6]

In any event, the court of appeals correctly held that petitioner's convictions of attempting unlawfully to dispense did not depend on whether the prescriptions were later presented for filling. As the court stated (Pet. App. 20a), when petitioner "wrote and sold prescriptions to individuals outside the scope of his professional duties," he (*ibid.*)

> had completed all the elements of the offense that he would ever commit and that were within his control. As far as Dr. Leu was concerned, the crime had been completed. If for some reason it was not in actuality completed, it was because of "factual" and not "legal" impossibility, and therefore not a sufficient defense to an attempt charge. *United States* v. *Heng Awkak Roman*, 356 F. Supp. 434 (S.D.N.Y.), *aff'd*, 484 F.2d 1271 (2d Cir. 1973), *cert. denied*, 415 U.S. 978 (1974). This is not a case of "mere preparation" but rather one of attempt to commit the crime of dispensing. Here we have "the commission of an overt act, the 'doing something directly moving toward, and bringing him nearer the crime he intends to commit.'" *United States* v. *Noreikis*, 481 F.2d 1177, 1181 (7th Cir. 1973).

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[6]As we explain in our brief in *Moore* (p. 24, n. 21) and in our memorandum in *Rosenberg* v. *United States*, pending on petition for a writ of certiorari, No. 74-1367, (pp. 4-5) (a copy of which we are sending to petitioner's counsel), it is our view that dispensing is lawful under the Controlled Substances Act when done pursuant to a lawful order of a practitioner "in the course of professional practice." See 21 U.S.C. 802(10), 802(20). Thus a physician who prescribes or administers drugs other than for a professional purpose is properly charged with unlawful "distributing" —that is, delivery "other than by administering or dispensing" (21 U.S.C. 802(11))—rather than with "dispensing." See *United States* v. *Rosenberg*, 515 F.2d 190, 200 (C.A. 9); *United States* v. *Black*, 512 F.2d 864, 866 (C.A. 9); *United States* v. *Badia*, 490 F.2d 296,

3. Petitioner's contention that his acquittal on the counts charging actual dispensing "precluded" his conviction on the attempt counts was answered by the court of appeals (Pet. App. 21a, n. 24):

> The attempt counts charge the defendant Leu with selling of prescriptions on entirely different occasions than do the first eleven substantive counts. Furthermore, as compared to the first eleven counts the proof on the attempt counts showed more dramatically that no legitimate medical purpose was involved (i.e. more frequent intervals and wholesale use of fictitious names).[7]

4. Petitioner claims that he was prejudiced by a jury instruction defining Schedule I controlled substances, when the charges against him related only to Schedule II and III controlled substances. The court of appeals properly rejected this claim (Pet. App. 19a, n. 23):

> The purpose of giving the definition of a Schedule I substance (high potential for abuse and no currently accepted medical use) was because the definition of Schedule I is referred to in the definition of Schedule III. It is clear that the defendant was not prejudiced by

298 and n. 4 (C.A. 1). But see *United States* v. *Leigh*, 487 F.2d 206 (C.A. 5).

While petitioner here was charged with attempting unlawfully to dispense rather than with attempting unlawfully to distribute, he did not raise below, nor does he present for review here, the issue whether a physician can properly be charged with unlawful dispensing rather than distributing. In any event, there is no fatal variance between proof of unlawful distributing by means of prescriptions issued outside the course of professional practice and the charge of unlawful dispensing based on commission of the same acts. In substance, the charge against petitioner was that he had issued prescriptions outside the course of professional practice, in violation of 21 U.S.C. 841(a)(1) (which proscribes both unauthorized "dispensing" and "distributing"). Petitioner's defense was that as a physician he could not be convicted under that statute so long as he wrote facially valid prescriptions (see Pet. App. 18a-19a). Accordingly, he fully understood the charge against him and was not prejudiced by the use in the indictment of one term rather than the other.

[7]The proof relating to the attempt counts consisted primarily of the sales to Agents Brown and Doyle described earlier.

> this instruction. The instruction as given was an accurate statement of the law as set out in 21 U.S.C. §812 and the judge not only informed the jury why he was reading them the definition of Schedule I substances, but also advised them that this case involved no such substances.

5. Petitioner argues that he was denied a fair trial because of adverse publicity, namely, news stories reporting the trial and sentencing of Dr. Valeriano Suarez, who had been convicted earlier of violating 21 U.S.C. 841(a)(1).[8] The court of appeals answered this claim as follows (Pet. App. 22a and n. 25):

> The defendant claims that news stories reporting his indictment and the trial of Dr. Suarez served to prejudice him. We note that most of the stories complained of were published or broadcast five months before defendant's trial, and accounts of Dr. Suarez' trial were published approximately six weeks before the start of Dr. Leu's trial.[25] At the voir dire it was established that the jurors had never heard of Dr. Leu or anything about this case. In addition, at the close of the evidence the jury was instructed to consider only the evidence presented in the courtroom and to disregard any press, television or radio reports they might have seen or heard. Considering the specific facts of this case, the intensity of the exposure and the nature of the publicity, we conclude that the publicity attendant with this trial was minimal and clearly does not warrant either a reversal or remand. *United States* v. *Barrett*, 505 F.2d 1091, 1100 (7th Cir. 1974), [certiorari denied, No. 74-950, May 12, 1975].

[8]The appeals of Suarez, Clifford T. Green, and Henry G. Fort were consolidated with petitioner's and their convictions also were affirmed. See 511 F.2d 1062; Pet. App. 1a-22a. Their petition for a writ of certiorari is pending in *Clifford T. Green, et al.* v. *United States*, No. 74-1233.

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[25]The fact that Dr. Suarez was sentenced during the trial of Dr. Leu does not establish substantial prejudice. Indeed, except for the bald assertion that the Suarez sentencing coincided with the Leu trial, the court's attention is not directed to any specific articles or broadcasts that contain anything more than a bare reporting of the facts.

6. Finally, petitioner contends that once he learned from the government's bill of particulars that part of the government's proof would be his knowing use of pseudonyms in issuing prescriptions, he was entitled to know the true names of the agents to whom he had issued the prescriptions in order to counter that proof. Petitioner never expressly made such a request in the trial court, and the trial judge denied his general pretrial request for a list of the government's witnesses, finding no special need for such disclosure.[9] Moreover, petitioner had been given copies of each prescription that was the subject of a count in the indictment and a compilation of statements that he had made to the agents during each alleged transaction—statements that made clear those instances in which the government would rely in part upon his use of fictitious names. Thus, petitioner was given ample material before trial to prepare his defense to this aspect of the government's proof.

[9]Rule 16, Fed. R. Crim. P., does not require pretrial disclosure of names and addresses of witnesses; such disclosure is required only in capital cases. See 18 U.S.C. 3432. The bill amending the Rules recently signed by the President does not change Rule 16 in this regard. See H.R. 6799, 94th Cong., 1st Sess.

It was not error for the court to refuse to order disclosure of the names of the agents.[10]

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Moore*, and then disposed of in accordance with that decision.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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[10]Petitioner's related claim that the government turned the investigation of his activities into a "sporting event" by using undercover agents with aliases is fully answered by the evidence of his own resort to fictitious names to disguise the sale of prescriptions. Moreover, we know of no prohibition on the government from using undercover agents who attempt to disguise their identities as law enforcement officers in the investigation of crime. Cf. *United States* v. *Russell*, 411 U.S. 423, 432-436.